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Supreme Court, U.S.
FILED

No. 001885 APR 16 2001

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In the Supreme Court of the United States

October Term, 2000

Ricardo Felipe Junco,

Petitioner,

v.

Harry Singletary,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1914-Civ-MOORE
MAGISTRATE JUDGE SORRENTINO

RICARDO FELIPE JUNCO :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

HARRY K. SINGLETARY, :

Respondents.

Ricardo Felipe Junco, a state prisoner confined at Avon park Correctional Institution, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking the constitutionality of his convictions of numerous felony offenses in Dade County Circuit Court case number 86-11397-A. William M. Morris, Esquire, subsequently entered an appearance in the case, limited to preparation and filing of a reply to the state's response to the order to show cause. [DE 13]

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of this petition the Court has a memorandum of law filed by the petitioner, the response of the state to an order to show cause with multiple exhibits, the *2 petitioner's reply by Mr. Norris, and a supplement to the pieadings filed by the petitioner. [DE 19]

Junco makes the following claims:

1. He was improperly convicted following a series of due process violations that undermined his right to a fair trial.

2. He received ineffective assistance of trial counsel.

3. He received ineffective assistance of appellate counsel.

4. He received ineffective assistance of appellate counsel.

5. His departure sentence is unlawful.

6. The information upon which he went to trial was defective.

7. He was deprived of his right to due process when he when he was given an insufficient amount of time to consider a plea offer.

8. His sentence was vindictively imposed because he rejected the plea offer.

9. The sentences imposed upon him were legally impermissible.

On September 15, 1986, Junco was charged by information with armed burglary (Counts I and VIII), armed kidnaping (Counts II – III, XVI – XX), armed robbery (Counts IV – V, XI – XV), second degree grand theft (Counts VI, XXI), aggravated battery with a firearm (Count VII), sexual battery (Counts IX – X), first degree *3 grand theft Count XXII), and trafficking in cocaine (Count XXIII). [DE 9, Ex.A] The charges stemmed from incidents surrounding three separate home invasion robberies.

Junco was tried to a jury in March, 1987, and was convicted of all offense charged, with the exception of being found guilty only of a lesser included offense on both sexual battery counts, and of being acquitted of trafficking in cocaine. [DE 9, Ex.B] On March 3, 1987, he was sentenced to sixteen consecutive terms of life imprisonment, followed by four consecutive terms of 15 years in prison, and by two terms of five years in prison. [DE 9, Ex.B]

Junco prosecuted a direct appeal, raising the sole claim that the court erred in imposing numerous consecutive terms of life imprisonment without stating clear and convincing reasons for departing from the guidelines. [DE 9, Ex.C] On March 28, 1989, the appellate court reversed and remanded the case for

resentencing. Junco v. State, 540 So.2d 898 (Fla. 3 DCA 1989). [DE 9, Ex.C]

On October 12, 1989, Junco again was sentenced to numerous terms of life in prison, with other lesser concurrent and consecutive terms of imprisonment. [DE 9, Ex.D] He again prosecuted a direct appeal, this time raising the following claims:

1. The trial court erred in jumping one cell on each of the four scoresheets *4 without enunciating a written reason for doing so.

2. The trial court erred in sentencing him for four separate sets of crimes.

[DE 9, Ex.E]

On December 26, 1990, the appellate court entered an opinion affirming in part and reversing in part, and remanding the case with instructions that Junco be sentenced within the guidelines or that written reasons for departure be entered. Junco v. State, 571 So. 2d 570 (Fla. 3 DCA 1990). [DE 9, Ex.E]

On March 6, 1991, pursuant to the remand, Junco was resentenced within the guidelines to life in prison, with additional concurrent and consecutive terms of lesser duration. [DE 9, Ex.E]

One year and two months later, in May, 1992, junco filed a motion for postconviction relief pursuant to Fla.R.Cr.P. 3.850,

raising in pertinent part claims two and five through nine of this federal petition, as listed above. [DE 9, Ex.F] A hearing was held on the motion on September 16, 1992, after which the motion was denied on the merits. [DE 9, Ex.F] On November 3, 1992, the appellate court affirmed that result without written opinion. Junco v. State, 608 So.2d 29 (Fla. 3 DCA 1992)(table). [DE 9, Ex.F]

*5 Eighteen months later, in June, 1992, Junco filed a second motion for postconviction relief, claiming that his first such motion had been incorrectly decided, and that his right to a fair trial was violated because he did not receive a competency evaluation. [DE 9, Ex.G] The motion was denied on October 12, 1994, upon the holding that the claims raised were procedurally barred. [DE 9, Ex.G] That result was affirmed, without opinion and apparently summarily, on January 11, 1995. Junco v State, 651 So.2d 687 (Fla. 3 DCA 1995)(table). [DE 9, Ex.G]

Nine months later, Junco filed a petition for writ of habeas corpus in the Third District Court of Appeal, claiming that he received ineffective assistance of counsel on direct appeal. [DE 9, Ex.H] Relief was denied on May 3, 1996. Junco v State, 675 So.2d 134 (Fla. 3 DCA 1996).

In his reply to the state's response and attached appendix, Junco demonstrates that he filed a petition for writ of mandamus in the trial court on April 26, 1996, seeking unspecified relief. [DE 12, Ex.1] The petition was dismissed for improper venue on August 7, 1996 [DE 12, Ex.2], and the result was affirmed in an opinion issued April 23, 1997. Junco v. Singletary, 691 So.2d 1208 (Fla. 3 DCA 1997). This federal proceeding ensued approximately two months later.

*6 In response to the order to show cause, the state argues correctly that this petition is subject to dismissal as time-barred pursuant to the to the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The time limit provision of 28 U.S.C. §2244(d) provides in pertinent part:

> (d)(1) A 1-year time period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), Pub.L. No. 104-132, 110 Stat. 1214, codified as amended at 28 U.S.C. §2244.

Although the Act did not contain an effective date provision for the foregoing amendments, they are presumed to have become effective on April 24, 1996, the date the law was enacted. Hatch v. Oklahoma, 92 F.3d 1012, 1014 n. 2, citing Bradshaw v. Story, 86 F.3d 164, 166 (10 Cir. 1996). Junco did not file this federal petition until July 19, 1997, so the Act's provisions clearly apply to his case.

*7 As the foregoing discussion of Junco's state procedural history demonstrates, his convictions became final on or about March 6, 1991, upon the conclusion of his direct appeal with its two remands to the trial court for resentencing. [DE 9, Ex.E]

Pursuant to §101(d)(2) of the Act, the limitations period is tolled by "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending...". In this case, subtracting the various periods during which Junco's various state postconviction proceedings were pending, and without even reaching the question of whether the second, successive Rule 3.850 motion was "properly filed" within the meaning of §101(d)(2), over three years lapsed between the date Junco's conviction became

final and the filing of this federal petition. This petition consequently is untimely pursuant to §101(d)(1) of the Act.

In his reply to the state's response [DE 12], Junco argues essentially that application of the AEDPA's limitations period to his case would constitute an impermissible retroactive application of the new statute. However, no such result would ensue.

The Eleventh Circuit Court of Appeals has not decided to what extent the presently relevant amendments brought about by the AEDPA, including the one-year limitations provision, apply to habeas corpus applications or motions to vacate relating to events *8 preceding that date. However, it is becoming apparent that the majority position is represented by decisions such as Reyes v. Keane, 90 F.3d 676 (2 Cir. 1996), where the court held that the new limitations period would apply to a §2254 petition filed prior to the effective date of the AEDPA, but provided a one-year grace period (the equivalent of the new limitations period) commencing as of the Act's effective date. See, e.g., Calderon v. United States District Court for the Central District of California, 112 F.3d 386 (9. Cir. 1997)("No petition filed on or before April 23, 1997 – one year from the date of the AEDPA's enactment – may be dismissed for failure to comply with the section 101's time limit."); United States

v. Lopez, 100 F.3d 113, 116 (10 Cir. 1996)(time limitation to bring a §2255 motion "attaches new legal consequences events completed before its enactment" and hence would not be applied retroactively to motion filed prior to date of enactment).[1]

However, the one-year grace period provided by the foregoing authorities to alleviate the retroactive consequences of the new Act expired at the close of April 23, 1997. This petition was not filed with the court until July 19, 1997, so it is apparent that *9 the application of the AEDPA and its limitations to this petition would not be retroactive.

For the foregoing reasons, it is recommended that this petition for writ of habeas corpus be dismissed as untimely pursuant to 28 U.S.C. §2244(d).

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: July 7, 1998

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[1] The petitioner relies in his reply on these same authorities [DE 12 at 2], but he misinterprets them to hold that no actions taken prior to the AEDPA's date of enactment can be taken into account when computing the one-year limitations provision. To the contrary, those cases stand for the proposition that the AEDPA does apply to convictions entered prior to its effective date, so they allowed the one-year grace period that expired on April 23, 1997, to alleviate what would otherwise have been an impermissible retroactive application of the new law.

(Signed)Charlene H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 97-1914-CIV-MOORE
Magistrate Judge Sorrentino

RICARDO FELIPE JUNCO,

Petitioner,

Vs. **ORDER**

HARRY K. SINGLETARY,

Respondent.
_____/

THIS CAUSE came before the Court upon Petitioner's petition for writ of habeas corpus. The Matter was referred to United States Magistrate Judge Charlene H. Sorrentino. In a Report filed July 7, 1998, Judge Sorrentino recommended that the petition be dismissed as untimely pursuant to 28 U.S.C. §2244(d). On July 17, 1998, Petitioner filed his Objections to Report of Magistrate Judge raising three objections: (1) The Magistrate Judge Erroneously failed to Exclude Time from the Limitation Period During State Collateral Review

Subsequent to the Effective date of the AEDPA; (2) The Magistrate Judge Applied the AEDPA in a Manner that Violates the Constitutional Prohibition Against Ex Post Facto Laws; and (3) The Magistrate Judge Failed to Consider Petitioner's Request for Equitable Tolling of the Statute of Limitations. On August 14, 1998, Petitioner filed a Documentary Supplement to his Objections to the Report, submitting to the Court evidence warranting consideration of Petitioner's third objection concerning equitable tolling.

The Court finds Petitioner's first and second objections without merit. With respect to Petitioner's third objection, however, there appears to be evidence that petitioner received *2 ineffective assistance of counsel in that his attorney believed there was no time limit to filing a request for federal habeas corpus relief. Given that Petitioner's petition has been deemed untimely, he certainly may have been prejudiced by his attorney's actions.

Accordingly, the Court at this time elects not to adopt Judge Sorrentino's recommendation that Petitioner's

writ be dismissed as untimely. Petitioner's petition for writ of habeas corpus shall be permitted to proceed on its merits.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of October, 1998.

(Signed)
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge
Charlene H. Sorrentino
William M. Norris, Esq.
Erin E. Dardis, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1914-Civ-MOORE
MAGISTRATE JUDGE SORRENTINO

RICARDO FELIPE JUNCO :

Petitioner, :

v. SUPPLEMENTAL REPORT OF
: MAGISTRATE JUDGE

HARRY K. SINGLETARY,
:

Respondent.

Ricardo Felipe Junco, a state prisoner confined at Avon Park Correctional Institution, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking the constitutionality of his conviction of numerous felony offenses following a jury trial in Dade County Circuit Court case number 86-11397-A.[1]

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and

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[1] William M. Norris, Esquire, entered a limited appearance in the case, confined to preparing and filing a reply to the state's initial response to the order to show cause. [DE 13] In his traverse to the supplemental response, the petitioner reports that he is "presently (and once again) pro se." [DE 30 at 3]

Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

*2 For its consideration of this petition the Court has a memorandum of law filed by the petitioner, the responses of the state to an order and two supplemental orders to show cause with multiple exhibits, the petitioner's reply to the initial response by Mr. Norris, a supplement to the pleadings filed by the petitioner, and the petitioner's pro se traverse to the first supplemental response.[2]

Junco makes the following claims:

1. He was improperly convicted following a series of due process violations that undermined his right to a fair trial.

2. He received ineffective assistance of trial counsel.

3. He received ineffective assistance of appellate counsel.

4. He received ineffective assistance of appellate counsel.

5. His departure sentence is unlawful.

---

[2] Junco's second motion for an extension of time to file a traverse to the state's second supplemental response was denied on March 29, 2000 [DE 38], on the holding that the report would be submitted as soon as possible and that any traverse received prior to that would be considered. As of this report, no traverse to the second supplemental response has been received.

6. The information upon which he went to trial was defective.

7. He was deprived of his right to due *3 process when he when he was given an insufficient amount of time to consider a plea offer.

8. His sentence was vindictively imposed because he rejected the plea offer.

9. The sentences imposed upon him were legally impermissible.

On September 15, 1986, Junco was charged by information with armed burglary (Counts I and VIII), armed kidnaping (Counts II – III, XVI – XX), armed robbery (Counts IV – V, XI – XV), second degree grand theft (Counts VI, XXI), aggravated battery with a firearm (Count VII), sexual battery (Counts IX – X), first degree grand theft Count XXII), and trafficking in cocaine (Count XXIII). [DE 9, Ex.A] The charges stemmed from incidents surrounding three separate home invasion robberies.

Junco was tried to a jury in March, 1987, and was convicted of all offense charged, with the exception of being found guilty only of a lesser included offense on both sexual battery counts, and of being acquitted of trafficking in cocaine. [DE 9, Ex.B] On March 3, 1987, he was sentenced to sixteen consecutive terms of life imprisonment, followed by four consecutive terms of

15 years in prison, and by two terms of five years in prison. [DE 9, Ex.B]

Junco prosecuted a direct appeal, raising the sole claim that the court erred in imposing numerous consecutive terms of life *4 imprisonment without stating clear and convincing reasons for departing from the guidelines. [DE 9, Ex.C] On March 28, 1989, the appellate court reversed and remanded the case for resentencing. Junco v. State, 540 So.2d 898 (Fla. 3 DCA 1989). [DE 9, Ex.C]

On October 12, 1989, Junco again was sentenced to numerous terms of life in prison, with other lesser concurrent and consecutive terms of imprisonment. [DE 9, Ex.D] He again prosecuted a direct appeal, this time raising the following claims:

> 10. The trial court erred in jumping one cell on each of the four scoresheets without enunciating a written reason for doing so.
>
> 11. The trial court erred in sentencing him for four separate sets of crimes.
>
> [DE 9, Ex.E]

On December 26, 1990, the appellate court entered an opinion affirming in part and reversing in part, and remanding the case with instructions that Junco be sentenced within the guidelines

or that written reasons for departure be entered. Junco v. State, 571 So. 2d 570 (Fla. 3 DCA 1990). [DE 9, Ex.E]

On March 6, 1991, pursuant to the remand, Junco was resentenced within the Florida Sentencing Guidelines to life in prison, with additional concurrent and consecutive terms of lesser

*5 duration. [DE 9, Ex.E]

In May, 1992, Junco, through counsel, filed a motion for postconviction relief pursuant to Fla.R.Cr.P. 3.850, raising in pertinent part claims two and five through nine of this federal petition, as listed above. [DE 9, Ex.F] A hearing was held on the motion on September 16, 1992. At its conclusion, the court held:

> As to the first six grounds you allege in your motion, Mr. Ali, I do not believe they are properly before me by way of a 3.850 motion, but should have been properly raised before the Third District Court of Appeal in the appellate process[3] and, indeed, the fact that he did have a highly qualified appellate attorney suggests to me those grounds – many grounds may not have been decisive which is why they were not raised on appeal ....
>
> [DE 9, Ex.F, T.14]

The trial court thereafter denied the second claim of this federal petition, concerning the effectiveness of trial counsel's

---

[3] The grounds referred to by the trial court correspond to claims five through nine of this federal petition, as listed above.

representation, on the merits. [Id. At 14-15] On November 3, 1992, the appellate court affirmed the trial court's findings without written opinion. Junco v. State, 608 So.2d 29 (Fla. 3 DCA 1992)(table). [DE 9, Ex.F]

*6 In June, 1992, Junco filed a second motion for postconviction relief, claiming that his first such motion had been incorrectly decided, and raising the first claim of this federal petition, as listed above. [DE 9, Ex.G] The motion was denied on October 12, 1994, upon the holding that the claims raised were procedurally barred. [DE 9, Ex.G] That result was affirmed, without opinion and apparently summarily, on January 11, 1995. Junco v State, 651 So.2d 687 (Fla. 3 DCA 1995)(table). [DE 9, Ex.G]

In 1993, Junco filed a petition for writ of habeas corpus in the Third District Court of Appeal, claiming that he received ineffective assistance of counsel on direct appeal because his lawyer had failed to present the competency issues. [DE 9, Ex.H] Relief was denied on May 3, 1996. Junco v State, 675 So.2d 134 (Fla. 3 DCA 1996). After additional state court proceedings not relevant here [DE 12, Ex.1-2], this federal proceedings ensued.

An initial report was submitted in this federal case in July, 1998, recommending that the petition be dismissed as untimely pursuant to 28 U.S.C. §2244(d), as amended by the Antiterrorism and Effective Death Penalty Act. [DE 21] On October 30, 1998, that recommendation was rejected and the case remanded for consideration on the merits by order of the Honorable K. Michael Moore, District Judge. [DE 25] A supplemental order to show cause accordingly was entered [DE 26], and the state submitted a supplemental response. *7 [DE 31] After the supplemental report was reviewed, a second supplemental order to show cause was entered [DE 32], and a second supplemental response with additional exhibits was filed in February, 2000. [DE 33]

Issued raised in a federal habeas corpus petition must have been fairly presented to the state courts and thereby exhausted. Anderson v. Harless, 459 U.S. 4 (1982); Hutchins v. Wainwright, 715 F.2d 512 (11 Cir. 1983). Exhaustion requires that a claim be pursued in the state courts through the appellate process. Leonard v. Wainwright, 601 F.2d 807 (5 Cir. 1979). With the exception of a portion of claim four, which will be discussed sequentially below,

Junco's claims have been exhausted in the state forum and are ripe for federal review.

In his first claim, Junco argues that he was improperly convicted following a series of due process violations that undermined his right to a fair trial. This claim was presented to the state courts in Junco's second Rule 3.850 proceeding [DE 9, Ex.G], where it was denied on the express holding that the claims raised were procedurally barred. [DE 9, Ex.G] That result subsequently was affirmed without explanation. Junco v. State, supra. [DE 9, Ex.G]

When a state court has applied a state procedural bar to a *8 claim, that claim is likewise barred from federal habeas corpus review. Ylst v. Nunnemaker, 501 U.S. 797 (1991); Coleman v. Thompson, 501 U.S. 722, (1991); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977). If the last reasoned opinion on a claim explicitly imposes a procedural default, it is presumed that a later decision rejecting the claim did not silently disregard the procedural bar and consider the merits. Ylst v. Nunnemaker, supra; Harmon v. Barton, 894 F.2d 1268 (11 Cir. 1990).

To overcome a procedural bar, a petitioner must demonstrate objective cause for the failure to properly raise the claim and actual prejudice resulting from the error complained of. United States v. Frady, 456 U.S. 152, 168 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

In his pro se traverse to the state's supplemental response [DE 30], Junco appears to argue essentially that no procedural bar was applied to his first claim at the state level. [Id. At 4-5] In this, he is simply incorrect, since his second Rule 3.850 motion was expressly "procedurally barred as untimely." [DE 9, Ex.G. Order at ¶1] Since Junco makes no other attempt to satisfy the cause and prejudice requirement, his first claim is procedurally barred from federal consideration.

*9 In his second claim, Junco contends that he received ineffective assistance of trial counsel because his lawyer allowed the trial to go forward without obtaining a competency examination of Junco. To prevail on a claim of ineffective assistance, a petitioner must demonstrate both that 1) his attorney's efforts fell below constitutional standards, and 2) he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668 (1984).

In his memorandum of law, the petitioner sets out lengthy quotations from the trial transcript which reflect the following facts. Prior to trial, the state offered Junco a sentence of twenty years in exchange for a plea of guilty to the offenses charged, which included 17 felonies punishable by life imprisonment. [DE 5 at 27] On the Friday before the Monday when trial was scheduled to begin, defense counsel requested that a competency examination be performed on Junco:

> DEFENSE COUNSEL: The last subject is I move to have Ricky Junco examined for psychiatric difficulties, because very frankly he's got to be examined by somebody.
>
> PROSECUTOR: I have no basis. I have never seen any basis for that.
>
> DEFENSE COUNSEL: He turned down the plea, that's a good basis alright.
>
> PROSECUTOR: I agree that turning the plea offer –
>
> DEFENSE COUNSEL: It is the best evidence *10 of insanity I've ever seen.
>
> PROSECUTOR: It doesn't make a lot of sense, but a lot of people want to go to trial, it doesn't make him crazy.
>
> DEFENSE COUNSEL: I think it's necessary. He's 19 years old. I think on the seriousness possibility of this case really requires a psychiatric examination.
>
> THE COURT: There never was one way back when these all came in?

DEFENSE COUNSEL: No, there never was.

THE COURT: This is a pretty serious deal, very serious, which I sincerely hope Mr. Junco realizes.

DEFENSE COUNSEL: I hope so too. I have spoken to him and I –

THE COURT: At this point I see ...seventeen felonies punishable by life in state prison.

DEFENSE COUNSEL: That's right.

THE COURT: Well maybe that's where he'd like to live, I don't know.

Al right, if that is what you need I will have JMH evaluate him, Jackson Memorial Hospital evaluation. See if we can't get it done – Jeff, if you call JMH, I think they will go over there this afternoon and see him and by Monday morning we will have a report.

Leaving it [for] trial Monday, November 17, and make arrangements with Lee for taking of the depositions ...

[DE 5 at 27-28]

*11 However, when the proceedings reconvened as scheduled the following Monday, the following exchange occurred:

DEFENSE COUNSEL: Your Honor, on Friday you ordered a JMH evaluation. I don't believe it was done.

Does anybody have a copy of it or any information?

DEFENSE COUNSEL: Yes, Judge.

Per your instructions, my secretary called Jackson.

> THE COURT: Oh, I am sorry, Tyrone. That sort of had a life of its own.
>
> Very candidly, I didn't mind if he was examined and we were ready today, but the fact that a defendant fails to accept a reasonable negotiated plea is not really an indication of insanity.
>
> It may be indication of stupidity, but it is not an indication of insanity.
>
> I am not going to allow that to cause for delay of trial.
>
> [T.4][4]

On the record in this case, it cannot be said that counsel's efforts fell below constitutional standards when he failed to press

*12 harder for a competency examination of Junco. A court is required to hold a competency hearing whenever there is substantial doubt concerning the defendant's competence. Pate v. Robinson, 383 U.S. 375 (1966). When a judge has knowledge of prior evidence of unusual behavior which is in evidence at trial or the subject of prior medical opinion, he or she is constitutionally obligated to order a competency evaluation. Drope v. Missouri, 420 U.S. 162, 179 (1975).

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[4] The trial transcript is found in the Court file at DE 34. The page numbers referred to are created for the record on Junco's direct appeal.

There are no "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." Drope, supra, but at a minimum the defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must have a "rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960).

The factors giving rise to a trial court's obligation to hold a competency hearing are: 1) prior evidence of the defendant's irrational behavior; 2) the defendant's demeanor at trial; and 3) prior medical opinions regarding the defendant's competence to stand trial. Dusky, supra; Reese v. Wainwright, 600 F.2d 1085, 1091 (5 Cir.), cert. denied, 444 U.S. 983 (1979).

In this case, not any of these factors were present. As the *13 discussion earlier in this report details, defense counsel requested and trial court granted a psychiatric examination strictly because Junco had elected to forego a plea bargain in favor of standing trial. There is no indication anywhere in the record that Junco was anything but rational and competent. Cf. Dusky, supra. Under these circumstances, there is no indication that had counsel continued to press for on a competency hearing, and had such a

hearing been conducted, the outcome of Junco's trial would have been different. Consequently, Junco is not entitled to release on his second claim.

In his third and fourth claims, Junco asserts that he received ineffective assistance of appellate counsel. The two-prong Strickland test is equally applicable in assessing counsel's performance in appellate proceedings. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

In his third claim, Junco contends that his appellate counsel rendered ineffective assistance by failing to challenge the court's decision, explained above, to go forward with the trial despite the fact that the psychiatric examination of Junco had not taken place. For the reasons discussed in connection with claim two, no error occurred in connection with the ruling, so Junco cannot show that but for appellate counsel's omission of such an argument, the outcome of his appeal would have been different, and he is entitled

*14 to no relief on claim three.

In his fourth claim, Junco reiterates his argument that his appellate lawyer performed ineffectively by failing to challenge the lack of a competency examination on direct appeal. To that extent,

his claim is duplicative of claim three and should be rejected for the same reasons.

Junco also argues in claim four that his appellate lawyer was ineffective for failing to raise issues on direct appeal corresponding to claims five through nine of this federal petition, as listed above. To that extent, claim four is both unexhausted and procedurally barred from federal review. Junco has never challenged his appellate lawyer's representation on the bases he now suggests in any state court proceeding, so those arguments are not exhausted for purposes of federal habeas corpus review. Anderson v. Harless, supra 9both the factual substance of the claim and the federal constitutional issue itself must have been presented to the state courts to achieve exhaustion).

Moreover, it would be futile to allow Junco an opportunity to return to the state forum to exhaust the unexhausted portions of claim four. Under Florida law, a successive habeas corpus petition regarding the effectiveness of appellate counsel, much like a successive motion for postconviction relief pursuant to Fla.R.Cr.P. *15 3.850, is subject to summary denial. Francois v. Wainwright, 470 So.2d 685 (Fla. 1985); Xiques v. Dugger, 571 So.2d 3 (Fla. 2 DCA 1990) Since Junco has already filed one state

application for a writ of habeas corpus predicated on his appellate counsel's representation, he is prohibited by this rule from taking a second bite at the apple. As the unexhausted portions of his fourth claim are now irrevocably barred from consideration by the state courts, this Court may also deem them procedurally barred. Collier v. Jones, 910 F.2d 770, 773 (11 Cir. 1990)(where dismissal to allow exhaustion f unexhausted claims would be futile due to state procedural bar, claims are procedural barred in federal court as well); Parker v. Dugger, 876 F.2d 1470, 1477-78 (11 Cir. 1989)("plain statement" rule of Harris v. Reed, 489 U.S. 255 (1989), does not apply when a claim was never presented in state court).

Junco's fifth through ninth claims, as listed above, are procedurally barred from federal review, because they were all expressly found by the trial court to have been procedurally defaulted in Junco's first state postconviction proceeding, because they could and should have been raised on direct appeal. [DE 9, Ex.F, T. 14] That holding was affirmed without opinion on appellate review. Since the last reasoned state court opinion explicitly imposed a procedural default on claims five through nine of this federal petition, they are likewise barred from federal review

in the absence of a showing of cause and prejudice. Ylst v. *16 Nunnmaker, supra; Wainwright v. Sykes, supra.

As noted above, see n. 2, supra, Junco has not filed a traverse to the state's second supplemental response, where it invoked the procedural bar defense as to clams five through nine of this federal petition. Since no showing of cause and prejudice has been mad, those claims are procedurally defaulted from federal consideration.[5]

Even were Junco's remaining claims not in procedural default, it is apparent that he would not prevail on their merits. In his fifth claim, Junco argues that his upward departure sentence is unlawful. Such a claim states no basis for federal habeas corpus relief. Branan v. Booth, 861 F.2d 1507 (11 Cir. 1988)(federal courts cannot review a state's alleged failure to adhere to its own

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[5] In claim four, as discussed above, Junco asserted that his appellate lawyer rendered ineffective assistance by failing to assign claims five through nine of this federal petition as error on direct appeal. Even if that argument were broadly read as an attempt to satisfy the cause and prejudice requirement as to claims four through nine, it is inadequate to render those claims cognizable on the merits, because it was never exhausted as an independent claim for relief in the state forum. Accord, Hill v. Jones, 81 F.3d 1015, 1029-31 (11 Cir.), cert. denied, 117 S.Ct. 1572 (1997)(exhausted but procedurally defaulted claims of ineffective assistance of counsel cannot be used to support a finding of cause for a state procedural default).

sentencing provisions, even when claim is "couched in terms of
*17 equal protection and due process").

In his sixth claim, Junco contends that the information upon which he went to trial was defective, because the charges of kidnaping, sexual battery and robbery were misjoined. The sufficiency of a state indictment or information is not cognizably on federal habeas corpus review unless the charging document is so deficient that the convicting court is deprived of jurisdiction. Heath v. Jones, 863 F.2d 815, 821 (11 Cir. 1989); DeBenedictus v. Wainwright, 674 F.2d 841 (11 Cir. 1982). A charging document is adequate where it incorporates the elements of the crime being charged. DeBenedictus v. Wainwright, supra at 842-43. The information in this case was sufficient to meet this test.

In his seventh claim, Junco argues that he was deprived of due process when he was not given sufficient time to consider a plea agreement offered by the state. Since a defendant has no constitutional entitlement to a plea bargain, Weatherford v. Bursey, 429 U.S. 545 (1977), it is apparent that this contention states no claim for relief.

In his eighth claim, Junco asserts that his sentence was vindictively imposed because he rejected the plea offer. This claim

is clearly without merit. There is on inference in the record either that the court participated in the plea negotiations (T.4), or that the sentence imposed at the conclusion of the trial was motivated in any way by Junco's rejection of the plea offer. Cf. *18 United States v. Stockwell, 472 U.S. 1186 (1973). Moreover, as discussed above, the sentence originally imposed was twice mitigated following appellate proceedings, so any error which arguendo could have existed in the original sentence was cured at the state level.

In his ninth claim, Junco revisits the argument that his sentence was legally impermissible under various Florida statutes and case authorities. [DE 5 at 44-46] As with his fifth claim, this argument states no basis for federal habeas corpus relief. Branan v. Booth, supra; see also, Redman v. Dugger, 866 F.2d 387 (11 Cir. 1989)(state's interpretation of its own rules or statutes does not raise a federal constitutional issue unless it rises to a level of denial of fundamental due process).

For the foregoing reasons, it is recommended that this petition for habeas corpus relief be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: April 12, 2000

(Signed)Charlene H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

*19

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1914-Civ-MOORE
MAGISTRATE JUDGE SORRENTINO

RICARDO FELIPE JUNCO :

Petitioner, :

v. : FINAL JUDGMENT
: HABEAS CORPUS

HARRY K. SINGLETARY, :

Respondent.

For the reasons stated in the report of the Magistrate Judge, and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This petition foe writ of habeas corpus is denied.

2. All pending motions not otherwise ruled upon are dismissed, as moot.

DONE AND ORDERED at Miami, Florida, this 15th day of June, 2000.

(Signed)
UNITED STATES DISTRICT JUDGE
K. Michael Moore

cc: Ricardo Felipe Junco, Pro Se
Erin E. Dardis, Esq.
William M. Norris, Esq.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Non-Argument Calendar

D.C. Docket No. 97-01914-CV-KMM

RICARDO FELIPE JUNCO,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS,
Michael W. Moore,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 16, 2001)

Before BLACK, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Ricardo Felipe Junco appeals the district court's denial of his 28 U.S.C. §2254 PETITION FOR WRIT OF HABEAS CORPUS. We affirm.

*2

BACKGROUND

A jury convicted Junco in 1987 of armed burglary, armed kidnaping, armed robbery, aggravated battery with a firearm, sexual battery, grand theft, and trafficking in cocaine in connection with a series of home invasion robberies. Junco argues in his §2254 petition that the trail court denied him his due process rights by (1) failing to allot sufficient time for Junco to consider a plea offer and (2) failing to have Junco evaluated for competency. Junco argues that his trial counsel rendered ineffective assistance by failing to have Junco evaluated for competency.

Junco's trial began on Monday; the Friday before trial, junco's attorney requested the court to order a psychiatric evaluation for Junco. Specifically, the record reflects the following:

> Defense counsel: The last subject is I move to have Ricky Junco examined for psychiatric difficulties, because very frankly he's got to be examined by somebody.

The state: I have no basis. I have never seen any basis for that.

Defense counsel: He turned down the plea, that's a good basis alright.

The state: I agree that turning the plea offer –

Defense counsel: It is the best evidence of insanity I've ever seen.

*3

The state: It doesn't make a lot of sense, but a lot of people want to go to trial, it doesn't make him crazy.

Defense counsel: I think it's necessary. He's 19 years old. I think on the seriousness possibility of this case really requires a psychiatric examination.

The court: There never was one way back when these all came in?

Defense counsel: No, there never was.

The court: This is a pretty serious deal, very serious, which I sincerely hope Mr. Junco realizes.

Defense counsel: I hope so too. I have spoken to him and I –

The court: At this point I see ...seventeen felonies punishable by life in state prison.

Defense counsel: That's right.

The court: Well maybe that's where he'd like to live, I don't know. All right, if that is what you need, I will have [Jackson Memorial Hospital] evaluate him, ...

On Monday, the date the trial began, the following exchanges occurred:

> Defense counsel: Your Honor, on Friday you ordered a [Jackson Memorial Hospital] evaluation. I don't believe it was done. Does anybody have a copy of it or any information?
>
> The state [sic]: Yes, Judge. Per your instructions, my secretary called Jackson.
>
> *4
>
> The court: ....Very candidly, I didn't mind if he was examined and we were ready today, but the fact that a defendant fails to accept a reasonable negotiated plea is not really an indication of insanity. It may be indication of stupidity, but it is not an indication of insanity. I am not going to allow that to be cause for delay of trial.

Junco directly appealed his conviction to a Florida court of appeals, claiming that the trial court erred in sentencing him. The Florida appellate court reversed his sentence, and remanded for resentencing. *See Junco v. State*, 540 So.2d 898 (Fla. Dist. Ct. App. 1989)(per curiam). After the trial court sentenced him, Junco again appealed, raising two additional

issues.[1] The appellate court again reversed in part and remanded, and the trial court again resentenced Junco. *See Junco v. State*. 571 So.2d 570 (Fla. Dist. Ct. App. 1990)

In 1992, Junco made a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. He raised several issues, including one of the due process claims[2] *5 and the effective assistance of counsel claims raised herein. The court rejected Junco's ineffective assistance of counsel claim on the merits, and denied his due process claim because it "should have been properly raised before the Third District

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[1] The Florida appellate court opinion reveals that Junco raised the following issues: The defendant argues first that the trial court erred in finding that the kidnapping and sexual battery were separate and distinct crimes from the home invasions....Second, the defendant argues [that] the trial court erred in the one cell upward departure without written reasons, since the crimes in this case were committed in April of 1986, and the sentencing guidelines amendment which permits a discretionary one cell upward departure without written reasons did not become effective until July 1, 1988.
Junco, 571 So.2d at 571.

[2] Junco challenged the constitutionality of the trial court's time-allotment for considering his plea offer.

Court of Appeal in the appellate process." *See State v. Junco*, Eleventh Judicial Circuit in and for Dade County Florida trial Hearing transcript (No. 86-11397, September 16, 1992). A Florida court of appeals affirmed the trial court's decision without written opinion. *See Junco v. State*, 608 So.2d 29 (Fla. Dist. Ct. App. 1992)(table).

Junco filed a second 3.850 motion for post-conviction relief in 1992, in which he raised his competency due process claim. The court denied Junco's petition because the claims were procedurally barred, and the Florida appellate court affirmed, again without opinion. *See Junco v. State*, 651 So.2d 687 (Fla. Dist. Ct. App. 1995)(table). In 1995, junco filed a petition for writ of habeas corpus in the Florida court of appeals, claiming ineffective assistance of appellate counsel. The court rejected his claim. *See Junco v. State*, 675 So.2d 134 (Fla. Dist. Ct. App. 1996)(table). Junco then filed the instant habeas

corpus petition with the district court. A magistrate judge denied his petition, and the district court adopted the magistrate judge's reasoning and denied the petition. Junco appeals.

DISCUSSION

*6 We review Junco's due process claims and effective assistance of counsel claims *de novo*. *See Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 20000; *United States v. Nyhuis*, 211 F.3d 1340 (11th Cir. 2000).

1. Was Junco denied the right to due process?

Junco claims the district court deprived him of the due process of law by (1) failing to get him a competency examination,[3] and (2) giving him inadequate time to consider

[3] Florida law provides:

> If, at any material stage of a criminal proceeding, the court ... has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing.

Fla.R.Crim.P. 3.210(b).

a plea offer. The Florida courts reviewing Junco's case determined that the due process claims were procedurally barred because these claims could have been raised on direct appeal. "When a state-law default prevents the state from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Here, the state-law *7 default – failure to raise the issue on direct appeal – prevents us from reaching the merits of Junco's claims.[4] We

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We find, contrary to Junco's assertions, that he has raised a *Pate v. Robinson*, 383 U.S. 375 (1966) claim. The thrust of his due process argument is that the trial court failed to have him evaluated for competency after his trial lawyer requested a competency hearing. Junco points to no substantive incompetency claim, and nowhere identifies any "clear and convincing evidence [raising] a substantial doubt as to his ... competency to stand trial." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992)(alteration in original)(quotation and citation omitted). Therefore, his habeas corpus petition raises a *Pate* claim, which "can and must be raised on direct appeal." *Id.* At 1572.

[4] Alternatively, as the magistrate judge observed, Junco's due process claim regarding his right to adequate time to consider a plea offer is meritless. *See Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain.").

therefore affirm the district court's denial of Junco's §2254 petition with respect to his due process claims.[5]

2. Did Junco's counsel provide ineffective assistance?

Junco argues that his counsel rendered ineffective assistance by not requesting a competency evaluation in a timely fashion, and by not ensuing that the court-ordered competency evaluation was conducted. A claim of ineffective assistance of counsel requires a showing that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that but for counsel's conduct, the results of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *See id.* At 689. The defendant bears the burden of proving

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[5] Junco has not demonstrated objective cause for failure to properly raise the claim and actual prejudice resulting from the error complained of, such as are required to overcome his failure to raise these issues on direct appeal. *See, e.g., United States v. Frady*, 456 U.S. 152, 168 (1982)

that counsel's performance was unreasonable under *8 prevailing professional norms and that the challenged action was not sound strategy. *See id.* At 688-89.

We agree with the magistrate judge that, "There is no indication anywhere in the record that Junco was anything but rational and competent. Under these circumstances, there is no indication that had counsel continued to press for [sic] a competency hearing, and had such a hearing been conducted, the outcome of Junco's trial would have been different." *Junco v Singletary*, Magistrate Judge Supplemental Report (No. 97-1914-Civ-MOORE, April 12, 2000). In other words, Junco has not satisfied the *Strickland* standard for establishing his ineffective assistance of counsel claim. *See, e.g. Baldwin v. Johnson*, 152 F.3d 1304, 1315 (11th Cir. 1998)(petitioner's "attempted showing of prejudice was insufficient to satisfy his burden under *Strickland*"), *cert. denied*, 526 U.S. 1047 (1999). Accordingly, we affirm the district court's denial of the portion of Junco's §2254 petition concerning ineffective assistance of counsel.

CONCLUSION

Because Junco is procedurally barred from raising his due process claims in his §2254 petition, and because he has not shown that his attorney rendered ineffective assistance of counsel, we affirm the denial of his petition for writ of habeas corpus.

*9 **AFFIRMED.**